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In The
Supreme Court of The United States
October Term 1996

JAMES L. DODARO, HOWARD YERUSALIM, FRANK A. URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, GEORGE PILECKI AND SEAN PILECKI,

Petitioners

vs.

CHARLES CHRISTY ,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A recent development in the Third Circuit since the time this Petition was filed provides further support for the need for this Court to review and reverse the Third Circuit's dismissal of Petitioners' qualified immunity appeal. The Third Circuit has just issued a decision in a case very similar to this case that directly rejects its own refusal to accept appellate jurisdiction over Petitioners' appeals in this case.

In *Grant v. City of Pittsburgh*, 1996 U.S. App. LEXIS 27253 (3d Cir. Oct. 18, 1996), the Court considered the appeals of twelve individual defendants whose summary judgment motions for qualifying immunity had been denied by the district court below. Like this case, *Grant* involved a claim of alleged political discrimination, asserted against numerous individuals. Like this case, the district court in *Grant* had denied qualified immunity without considering the individual position of each appellant. *Unlike* this case, however, the Third Circuit in *Grant* accepted jurisdiction over the interlocutory appeal, and held that the district court had improperly failed to analyze separately the specific conduct of each individual defendant claiming qualified immunity. *Id.* at *2, *12.

The Third Circuit held that it had jurisdiction over the appeal under *Johnson v. Jones*, 115 S.Ct. 2151 (1995), because by failing to consider each individual defendant's qualified immunity claim separately, the district court did not apply the correct legal standard, and thus the appeal raised a question of law. *Grant*, slip op. at *7.[1]

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[1] The *Grant* decision is the first case other than the matter on petition in which the Third Circuit has cited *Johnson v. Jones*. It is also the first time that the Third Circuit has cited *Behrens v. Pelletier*, 116 S.Ct. 834 (1996), which it cited in concluding that defendants may appeal the denial of qualified immunity at the summary judgment stage even if they had not

(continued...)

The Third Circuit emphasized that the District Court's failure to look individually at each defendant's situation made it "virtually impossible" for the appellate court to review the qualified immunity claims. *Id.* at *12. In remanding the case, the Court emphasized the importance of individual review of qualified immunity claims:

> Taking heed of the narrower focus required by *Anderson* [*v. Creighton*, 483 U.S. 635 (1987)] (i.e., at the official's specific conduct, not just the right allegedly violated) is critical, for it can mean the difference between immunity from suit and being held personally liable for money damages.
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> Thus, crucial to the resolution of any assertion of qualified immunity is a careful examination of the record (preferably by the District Court) to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant
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> . . .

Grant, slip op. at *13-14, *15. The Court specifically noted that for eight of the individual defendants "the summary judgment ruling fails to set forth with enough specificity the conduct of each defendant that the District Court thought sufficient to defeat qualified immunity" and with respect to the other four individual defendants, "the District Court announced no findings whatsoever." *Id.* at *17. The Circuit Court acknowledged this Court's admonition in *Johnson v. Jones* that the Circuit Court may need to "'undertake a cumbersome review of the record'" if the district court has not, *Id.* at *20 (quoting *Johnson*, 115 S.Ct. at 2159). In *Grant*, however, the appellants apparently agreed to a remand rather than having the Circuit Court perform the necessary review of the record. *Id.* at *20, n. 2.

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[1](...continued)
appealed from the denial of qualified immunity at the initial pleading stage.

The failure of the District Court to undertake separate consideration of each individual defendant's qualified immunity claims is precisely the same error that Petitioners in this case asserted to the Third Circuit. That failure was critical in this case, as the district court's own actions demonstrate. As noted in the Petition for Writ of Certiorari, one of the Petitioners, Frank Ursomarso, *individually* filed a Motion for Reconsideration with the District Court following the denial of summary judgment. When the District Court considered Mr. Ursomarso's qualified immunity claim *individually*, it reversed its prior ruling and entered summary judgment. Thus, there is no question that individual consideration of qualified immunity claims could be crucial for each of the petitioners in this matter, as the Third Circuit acknowledged in *Grant*.

Respondent Christy makes the same error in his Opposition to the Petition for Writ of Certiorari, asserting facts indiscriminately against the Petitioners as a group with no attempt to address the separate and distinct circumstances of each Petitioner's involvement in the promotion process at issue. Each of the Petitioners had different knowledge and different responsibilities that must be considered in determining whether he or she reasonably could have believed he or she was complying with clearly established law. Each Petitioner is entitled to have the Court consider his or her own individual circumstances and involvement, rather than having qualified immunity summarily rejected as a 'gang of twelve.'

The response of the Third Circuit to the qualified immunity claims in *Grant* directly contradicts the response in this case. In *Grant*, the Third Circuit accepted jurisdiction and remanded the matter for more complete review of the qualified immunity claims. In this case, however, the Court dismissed the Appeal under *Johnson v. Jones*, undertaking no individual review.

The Third Circuit's decision in *Grant v. City of Pittsburgh* is consistent with this Court's teaching on qualified immunity appellate jurisdiction. Application of the decision in *Grant v. City of*

Pittsburgh to this case would have resulted in the Third Circuit accepting jurisdiction and remanding the matter to the District Court for individual consideration of the qualified immunity claims. The treatment given to the petitioners herein is inconsistent not only with prevailing law in other circuits, but also with the more recent precedential determination from the Third Circuit. Indeed, under *Grant*, the dismissal of Petitioners' appeals would not be permitted. For these reasons as well as the reasons stated in the Petition for Writ of Certiorari, petitioners respectfully request that the Court grant a Writ of Certiorari in this case.[2]

Respectfully submitted,

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[2] As stated in footnote 12 of the Petition for Writ of Certiorari, petitioners specifically ask that this Court consider summary reversal and remand of the matter to the Third Circuit with instructions that it accept jurisdiction and consider petitioners' qualified immunity appeals on the merits. This request is all the more appropriate in light of the decision in *Grant v. City of Pittsburgh*.